FILE COPY

Supreme Court, U. S.
FILED
FEB 3 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

TO THE OCTOBER TERM, 1946.

ROYAL PACKING COMPANY, a Corporation,
Petitioner,
v.
PAUL A. PORTER, Price Administrator, Office of Price Administration,
Respondent.

No. 976

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT.

DOUGLAS H. JONES and
LLOYD E. BOAS,
706 Chestnut Street,
St. Louis, Missouri,
Attorneys for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Petition for writ of certiorari	1-20
Preliminary	1
Opinion of the Court below	2
Summary statement of matters involved	2
Findings and judgment	11
Jurisdiction of this Court	15
Questions presented	17
Reasons relied on for issuance of writ	18
Prayer for writ	19
Brief in support of petition for writ of certiorari	21-43
Opinion of the Court	21
Statement of the case	21
Assignment of errors and authorities in support thereof	22
Argument	24
Point I. The Court erred in reversing the Trial Court's conclusion that Sec. 205 (d) of the Emergency Price Control Act of 1942 prohibited recovery of damages by the plaintiff	22
Point II. The Court of Appeals erred in reversing the Trial Court's finding of good faith, which was based upon the oral testimony of witnesses	36
Conclusion	42

Cases Cited.

Adamson v. Gilliand, 242 U. S. 350, 61 L. Ed. 356...23, 40

Alabama Power Co. v. Ickes, 302 U. S. 464, 58 Sup. Ct. 300 ....23, 41

Amtorg Trading Corp. v. Higgins, 150 Fed. 2d 356, 2nd C. C. A. 23, 40

Bowles v. Franceschini, 145 Fed. 2d 510 (9th Cir.) 16, 18, 22, 28
Bowles v. Griffin, 151 Fed. 2d 458 (5th Cir.) ... 16, 18, 22, 27
Bowles v. Indianapolis Glove Co., 150 Fed. 2d 597 (7th Cir.) 16, 18, 22, 26

In re 620 Church Street Bldg. Corp. et al., 299 U. S. 24, 57 Sup. Ct. 88 17
Irick v. Irick et al., 150 Fed. 2d 514, 4th C. C. A. 23, 39

Michigan Fire & Marine Insurance Co. et al. v. National Surety Corp., 156 Fed. 2d 329 ..... 22, 38
Muncie Gear Works v. Outboard Marine Mfg. Co., 315 U. S. 759, 62 Sup. Ct. 865 17

Overfield et al. v. Pennsylvania R. R. Co. et al., 146 Fed. 2d 889 ..... 22, 38, 40

Schreffler v. Bowles, 153 Fed. 2d 1 ..... 16, 18, 22, 25

United States v. Aluminum Company of America, 148 Fed. 2d 416, 2nd C. C. A. 22, 38
Urleng v. Fink, 141 Fed. 2d 58, 3rd C. C. A. 22, 39

Virginia Ry. Co. v. System Federation No. 40, 300 U. S. 551, Sup. Ct. 592 ..... 23, 41

Wells Lamont Corp. v. Bowles, 149 Fed. 2d 364 ..... 16, 18, 22, 27

Statutes Cited.

Emergency Price Control Act, Sec. 205 (d) (e), Title 50, U. S. C. A., Appx., Sec. 925 (d) (e), 56 Stat. 33 ..... 2, 3, 4, 13, 14, 16, 17, 18, 22, 24, 25, 28
Federal Rules of Civil Procedure, Rules 52 and 52A, Title 28, U. S. C. A., fol. Sec. 723 (c), 48 Stat. 1064 ..... 17, 22, 37

Judicial Code, Sec. 240, as amended (36 Statutes 1157, 43 Stat. 938, Title 28, U. S. C. A., Sec. 347)..... 15
Price Control Extension Act of 1946 (Chapter 671, Public Laws 548, U. S. Code, Congressional Service Advance Sheet 6—Laws of 79th Cong., Sec. Sess., 1946, pages 632 through 646), Sec. 205 (e)..... 14
R. M. P. R. No. 169 (7 F. R. 1033, as amended 8 F. R. 9995) 12, 22, 31, 32, 34

IN THE

SUPREME COURT OF THE UNITED STATES.

TO THE OCTOBER TERM, 1946.

ROYAL PACKING COMPANY, a Corporation,
Petitioner,
v.
PAUL A. PORTER, Price Administrator, Office of Price Administration,
Respondent.

No. .....

PETITION FOR CERTIORARI
To the United States Circuit Court of Appeals for the Eighth Circuit.

Comes now Royal Packing Company, a corporation, and respectfully petitions this Honorable Court to grant a Writ of Certiorari for review of the opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, rendered the 24th day of October, 1945, in a cause styled Paul A. Porter, Price Administrator, Office of Price Administration (Plaintiff-Appellant), v. Royal Packing Company, a Corporation (Defendant-Appellee), being civil cause No. 13,354, on the docket of said Circuit Court of Appeals, wherein said Court reversed in part a judgment of the District Court of the United States for

the Eastern Judicial District of Missouri, Eastern Division, and ordered said Court to enter judgment against this petitioner for the sum of $6,928.18 instead of $185.37, the amount of the judgment rendered by the District Court (R. 150, 151, 155).

Petitioner further states that on the 8th day of November, 1946, this petitioner filed its petition for a rehearing of said cause with the United States Circuit Court of Appeals, Eighth Circuit (R. 168), which petition was denied by said Court on the 21st day of November, 1946, and said judgment thereby became final (R. 169). On November 30, 1946, an order was entered by the Circuit Court of Appeals staying the mandate in said cause for a period of 30 days pending application to this Court for a Writ of Certiorari. Thereafter by stipulation an order was entered by said Court further staying the mandate for a period of 30 days from January 4, 1947.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit, which petitioner seeks here to have reviewed, is set out in the transcript of the record filed herewith at pages 150 to 156, inclusive, and is reported in 157 Fed. 2d 524.

SUMMARY STATEMENT OF MATTERS INVOLVED.

Briefly stated the matters involved in this proceeding are as follows:

1. Do the provisions of Section 205 (d) of the Emergency Price Control Act [Title 50, U. S. C. A., Appx., Sec. 925 (d)] prohibit the recovery of damages by the Price Administrator for overcharges made in good faith pursuant to the written instructions of his duly authorized State Price Attorney?

2. Is it proper for an Appellate Court to overrule a fact finding of good faith, made by a trial court on oral testimony of witnesses, without holding that said finding is clearly erroneous or unsupported by the evidence?

3. Can an Appellate Court adopt a trial court's finding of good faith to affirm a part of a judgment and at the same time overrule that finding to reverse another part of the judgment without holding it clearly erroneous or without evidential support?

These matters arise in the following manner:

This case was originally instituted by the Administrator of the Office of Price Administration filing a complaint in the U. S. District Court for the Eastern District of Missouri. The complaint contained two counts, both of which were based on alleged overcharges made by defendant on the sale of beef and veal carcasses and wholesale cuts in that said sales were in carload lots and defendant had failed to deduct the carload discount of 25¢ per c. w. t. as required by Section 1354.453 (b) of R. M. P. R. 169 (7 Fed. Reg. 10381, amended 8 Fed. Reg. 9995). The first count sought injunctive relief to prohibit future violations by the defendant and was brought pursuant to Sec. 205 (a) of the Emergency Price Control Act [Title II, Sec. 205, 56 Stat. 33, Tit. 50, U. S. C. A., Appx., Sec. 925 (a)], hereinafter called the Act. The second count was based on the same allegations and sought recovery of penalties totalling $20,784.54 under Sec. 205 (e) of the Act (R. 2, 3, 4, 5, 6 and 7).

Defendant's answer admitted the sales specifically pleaded in the complaint but denied that the prices charged and pleaded were in excess of the maximum ceiling prices permissible under R. M. P. R. 169, for the reason that said prices included a transportation charge permitted by R. M. P. R. 169 and more particularly sections

1364.451—1364.452—1364.453—1364.454 thereof. Certain charges in excess of the 25¢ per c. w. t. transportation charge were admitted as overcharges and defendant pleaded that they resulted from accident, mistake or inadvertence of its employees and not from a willful or intentional violation of the regulations.

The answer further affirmatively pleaded that defendant had at all times made timely, positive and diligent effort to keep abreast of the regulations and conscientiously endeavored to operate in strict compliance therewith; that the 25¢ per c. w. t. transportation charge was made by defendant in good faith pursuant to the written instructions and interpretation of the Administrator's duly qualified and acting State Price Attorney and by reason thereof defendant was exempted from damages or penalties by the terms and provisions of Section 205 (d) of the Act [Title 50, U. S. C. A., Appendix, Sec. 925 (d)].

Defendant further pleaded that the regulations of the War Food Administration required it to dispose of 35 to 60 per cent of its products to the Armed Forces or processors supplying them; that there were no Armed Force outlets in defendant's local truck zone and in order to legally dispose of its products, defendant was compelled to ship by rail to eastern processors supplying the Armed Forces and that R. M. P. R. 169; that the interpretation placed thereon by the local office of the Office of Price Administration permitted the addition of a 25¢ per c. w. t. transportation charge to cover the cost of transporting meat from plant to the railroad siding. (Defendant's plant is located five miles from railroad station [R. 134] [Answer, R. 7 to 14, incl.].)

Plaintiff's reply denied that the regulations permitted the addition of the transportation charges; that the sales were made pursuant to written instructions from any duly

qualified and acting State Price Attorney for the Office of Price Administration; that any such instruction was ever placed on Regulation No. 169 or that the sales were made by defendant pursuant to any written interpretation authorized by the Administrator (R. 15). The reply further pleaded no information concerning War Food Administrations requirements on sales of defendant's products to the Armed Forces, but denied that the sales were to processors supplying the Armed Forces and further denied that any construction or interpretation of the regulation authorizing the 25¢ per c. w. t. transportation charge had been made by any duly authorized person or agent of the plaintiff (R. 15).

The case was tried to the Court without a jury and plaintiff's evidence in chief consisted of the defendant's copies of the invoices covering the sales made by defendant to House of Freirich, New York City; Washington Beef Co., New York City; Greisler & Sons, Philadelphia, Pa.; Grand Union Meat Co., New York City; Francis D. Ellis, Inc., Philadelphia, Pa., and Hark Beef Co., Boston, Mass., from January 1st, 1944, through July 1st, 1944 (R. 24). There were 123 invoices included in Exhibit No. 1 (R. 17). The above purchasers were wholesalers of meat and bought for resale (R. 25). All sales and shipments reflected by Exhibit No. 1 were made f. o. b. defendant's plant, with the customer paying all shipping charges (R. 26). The bills of lading covering the same sales were offered as Exhibit No. 2 (R. 25), and defendant's ledger sheets showing receipt of the prices charged were introduced as Exhibit No. 3 (R. 25), (R. 29 through 55). A tabulation made by plaintiff's employees which covered the sales reflected by the other exhibits and showed an alleged total overcharges of $6,928.18 was introduced as Plaintiff's Exhibit No. 4 (R. 75 through 87). This tabulation was admitted to be correct and it showed that over-

charges totaling $185.37, over and above the 25¢ per c. w. t. delivery charge, were made. All of the above documents were identified by Joe Sokolik, Secretary of the defendant, and on cross-examination he testified that the invoices in Exhibit No. 1 were the copies retained in defendant's file; that one copy went to the customer, one with the bill of lading, and one to a broker, if sale was through a broker; that the shipping charges made by the carriers were paid directly to the carrier by the customer (R. 89).

Defendant's evidence was as follows:

Ben Hamlin, billing clerk and traffic man for defendant, testified that he made up the invoices on defendant's shipments and graded and priced according to Government grades and in accordance with the prices shown by Defendant's Exhibit "A" (R. 93 to 98), which was an O. P. A. price list (R. 99), kept current with O. P. A. price changes; that they were frequently and emphatically instructed to keep prices correct (R. 99); that the words "above price includes twenty-five cents hundred weight transportation charge permitted by O. P. A." were stamped on the customer's copies of the invoice (R. 102).

Thelma Max, accounts receivable bookkeeper for defendant, testified that her job was to check Mr. Hamlin's invoices; check the prices, points and extensions and post the amounts in the ledger; that she kept an O. P. A. price list on her desk and checked all prices against the list (R. 105); that her list was immediately changed to reflect price or point changes by O. P. A.; that they were told to be very careful in pricing and keeping price lists current and that they were very careful to do so (R. 106).

Joe Sokolik, Treasurer of Defendant, testified that he supervised the office and kept abreast of the regulations

so the company could operate in compliance; that defendant was strictly a carcass and wholesale cut slaughterer and did no processing (R. 107); that their plant had no railroad siding and on interstate shipments the meat was loaded on a truck at the plant and transported to the Bremen Team Track and loaded into a railroad car and shipped to the buyers; that all local deliveries were made in defendant's own trucks and a transportation charge was made for delivery anywhere in the city; that on carload interstate shipments the shipping charges were paid to the carrier by the purchasers (R. 108); that when defendant first went into interstate shipping he went down to Mr. Earl Fishgoll, plaintiff's price attorney on meats, and explained that the plant was not on a railroad siding and that they had to go down by truck, and wanted to know how to price on carload shipments on that basis; that Fishgoll requested him to write a letter requesting an interpretation; that he wrote such a letter, which was produced, identified as Defendant's Exhibit "B" and introduced without objection thereto (R. 109, 110). Exhibit "B" stated:

> **"Also, we would like to know something about delivery charges under Regulation 169. What maximum charges can be made for local and other deliveries of a greater distance from zone five. Also, should this charge be incorporated in ceiling prices or enumerated separately on a bill of sale";**

that in response thereto he received Defendant's Exhibit "C", which was introduced with no objection (R. 111, 112, 113); that Exhibit "C" was not sufficiently clear to permit him to determine what transportation charges to make, so he telephoned Mr. Fishgoll and asked for a clearer answer; that shortly afterwards he received Exhibit "D" (R. 115, 116, 117), which was introduced without objection on any ground (R. 115). Exhibit "D," a

letter from the Office of Price Administration, and signed by Ronald J. Foulis, state price attorney, recited the questions presented. Question 3 (R. 116) was as follows:

> "3. The third question which you asked in your conversation with this office concerned delivery of beef carcasses and wholesale cuts to a purchaser in New York. You stated that you had never shipped such carcasses or cuts in car route or carload shipments, and you asked about the manner in which you are to determine your maximum price for such shipments."

The answer to this question was as follows (R. 117):

> "3. The manner in which maximum prices are computed for beef carcasses and wholesale cuts is set forth in Section 1364.451 of Maximum Price Regulation No. 169. Subparagraph (a) (3) of this section reads as follows:
>
> > "'the applicable zone price shall be the price specified in Schedule I (Section 1364.452) for the zone in which is located the seller's distribution point. . . .'
>
> "This language, when read in conjunction with other paragraphs in this section, indicates that the maximum price at which you may sell beef carcasses or beef wholesale cuts to a purchaser in New York, in less than carload lots or carload lots, is the St. Louis zone price, minus the required deductions, plus the permitted additions set forth in the Regulation. The reason is that your distribution point is in this zone, and, as stated in the section quoted above, the applicable zone price is the price for the zone in which the seller's distribution point is located.
>
> "If there is any further information we can give you in this matter, please do not hesitate to call on us."

That following receipt of this letter (Exhibit "D") defendant deducted 25¢ per cwt. on carload shipments and

added 25¢ per cwt. for transportation; that on April 10, 1943, he received Exhibit "E" from Ronald J. Foulis without having communicated, by phone or otherwise, with the price department since the receipt of Exhibit "D" on March 17th; that Exhibit "E" was sent of their own accord. Exhibit "E," a letter from plaintiff, signed by Ronald J. Foulis, state price attorney, was introduced without objection (R. 118). It recited that their letter of March 17th had answered several questions relative to pricing beef and veal, which defendant was selling to a New York purchaser for the first time. Paragraph 2 of Exhibit "E" stated that the Washington office had now advised the local office that the prices were "to be figured, under different circumstances, in different manners." It then proceeded to tell defendant that on less than carload shipments to New York defendant should pay the railroad charges and invoice the purchaser at the New York zone price. The letter then continued to advise defendant how to price on carload shipments as follows (R. 120):

> "If, on the other hand, you ship by carload rail shipment or by truck, you may ship f. o. b. your plant, but the buyer must pay the shipping charges directly to the carrier. This is provided for in Subparagraph (iii) of the section referred to above. Furthermore, if you use your own vehicle for transportation purposes, when delivering from one zone to another, you would take the zone price in which is located your distribution point and add local delivery charges. Section 1364.451 (a) (e) (ii) is the section which covers such a transaction.
>
> "If there is any further information you wish, please do not hesitate to contact this office."

That subsequent to receipt of Exhibit "E," defendant, on carload shipments, took the St. Louis zone price, deducted 25¢ per cwt. carload discount and added 25¢ per cwt. transportation or local delivery charge for transport-

ing the meat from the plant to the railroad siding in its own vehicle (R. 120); that a survey of the cost of transporting the meat in their own vehicle to the railroad siding was made and disclosed that it cost about twenty-eight to thirty cents per cwt. and exceeded the 25¢ per cwt. charged; that immediately upon the filing of the suit the charge was discontinued (R. 123). An offer of proof was made and refused, which disclosed that the meat industry was subsidized and that an amount equal to the overcharges found by the court would have to be refunded to Defense Supplies Corporation under its regulations (R. 124).

On cross-examination Mr. Sokolik testified that he relied entirely on the letter of April 10, 1943 (Exhibit "E") (R. 124), and that he read the regulations and did his best to interpret and comply with them; that he thought the letter was clear itself (R. 125).

In rebuttal plaintiff introduced Plaintiff's Exhibit 5, which was a certificate of Erwin H. Vollach, Secretary to Chester Bowles, that the three teletype messages to O. P. A. branch offices, as contained in said Exhibit 5, were true copies of documents in official custody of the Administrator of the Office of Price Administration (R. 127). Plaintiff's counsel referred to them as interpretations of the regulations and stated to the court that they were never published, and that the only way to present them to the court was to introduce them in evidence (R. 127). The substance of these communications is that R. M. P. R. 169 does not permit the addition of transportation charges to cover transportation of meat from slaughtering point to railroad (R. 128, 129, 130, 131). The first one (R. 128) conclusively shows that on December 13, 1944, the Dallas Office (Regional office for the St. Louis District) submitted the following question to the Washington Office:

> "May A charge B for transportation of the meats from the slaughter plant to the railroad siding pur-

suant to the provisions of Section 1364.454 (a) permitting such addition for transportation from the point at which the meat was slaughtered to a distribution point located in the same price zone as the slaughterer point?" (R. 128.)

(Thus six months after the present suit was instituted by the St. Louis District Office attorneys, the personnel of the Regional Office could not tell that the charge was improper and found it necessary to write Washington to interpret the regulation.)

The third communication in Plaintiff's Exhibit 5 (R. 130, 131) discloses that on July 18, 1944, the San Francisco Office of the Administrator requested the Washington Office to confirm or correct an interpretation of R. M. P. R. 169, Sections 1364.454 (a) (2) and 1364.451 (a) (3), "holding that where packers located any distance from the point in the same zone where carload shipments are loaded on cars, the loading point becomes the packer's distribution point, thus enabling the packer to charge for hauling meat from slaughtering plant to 'distribution point.'" [The communication answering this inquiry (Plaintiff's Exhibit 5, R. 130), which went to all offices, was dated July 24, 1944. The suit in the present case was filed August 22, 1944 (R. 2).]

FINDINGS AND JUDGMENT.

The trial court found that defendant was a non-processing slaughterer and subject to R. M. P. R. 169; that defendant's plant was located at 1719 N. Vandeventer in St. Louis and was not on a railroad siding; that from January 1, 1944, to July 1, 1944, defendant sold and delivered 2,697,126 pounds of beef and veal which was shipped in carload lots to purchasers in New York, Philadelphia and Boston and that this meat was transported in defendant's own vehicle for a distance of five miles to the Breman

team track, where it was loaded into cars for f. o. b. carload rail shipment with the buyers paying the rail shipping charges directly to the carrier and defendant adding 25¢ per c. w. t. to the St. Louis zone price to cover the cost of transporting meat in its own vehicle (F. F. 4, R. 134), that the 25¢ per c. w. t. transportation charge added was separately stated on the invoices sent to the buyers as required by R. M. P. R. 169 [Sec. 1364-454 (A) (6)] and that defendant's actual cost of transporting the meat exceeded the amount charged therefor by approximately five cents per c. w. t. (F. F. 5, R. 134, 135); that overcharges of $185.37, over and above the transportation charge, were admitted by the defendant and shown by the evidence (F. F. 6, R. 135); that defendant had at all times made diligent and positive efforts to comply strictly with the regulations and frequently cautioned employees to be extremely careful to comply (F. F. 7, R. 135); that the admitted overcharge of $185.37 resulted from inadvertence or mistake and not from a willful or intentional violation or a failure to take due precaution to avoid violations (F. F. 8, R. 135); that in the early part of 1943, defendant addressed a written inquiry to the local price department seeking instructions and advice concerning what transportation charges could be added on products sold to eastern buyers and that in response thereto, by an official interpretation admittedly signed by the State Price Attorney for the Administrator, defendant was advised that a 25¢ per c. w. t. transportation charge could be added to cover the cost of transporting the meat in its own vehicle (F. F. 9, R. 135, 136); that the 25¢ per c. w. t. transportation charge was added by the defendant in good faith pursuant to and in reliance upon the written advice and instruction of plaintiff's state price attorney (F. F. 10, R. 136)

For his conclusions of law the trial court concluded that the evidence did not justify the issuance of an in-

junction (R. 136); that the applicable sections of R. M. P. R. 169 permitted the addition of the transportation charges and that the evidence failed to show any overcharge except $185.37, which was admitted by defendant (R. 137). The court further concluded that Section 205 (d) of the Act [Title 50, U. S. C. A., Appx. Sec. 925 (d)] prohibited recovery of damages or penalties for acts done in good faith pursuant to the act, order, regulation, requirement or agreement thereunder, and since the evidence showed that defendant added the 25¢ per c. w. t. transportation charge in good faith, pursuant to and in reliance upon plaintiff's written advice and instructions, no recovery could be had regardless of the correctness of the court's construction of the regulations (R. 137), judgment of dismissal as to count one was entered and judgment for $185.37 and costs in favor of plaintiff and against defendant was entered on count two (R. 139).

Plaintiff appealed from the judgment and by an opinion handed down on October 24, 1946, the United States Circuit Court of Appeals (8th Cir.) the trial court's denial of injunctive relief was sustained. The judgment under Count two was reversed and remanded with directions to enter a judgment against the defendant for the sum of $6,928.18, the amount of overcharges alleged by plaintiff. In its opinion the Court of Appeals found that the trial court was in error in construing the regulations to permit the addition of the 25¢ per c. w. t. transportation charge. The opinion states (R. 155):

> **"We conclude that the trial court was in error in its finding and conclusion as to the meaning of distribution point in the regulations, and as the interpretation is a question of law the judgment of dismissal must be avoided."** (Emphasis ours.)

We believe the Court of Appeals had the right to so interpret the regulations and overrule the trial court on

the question of law and although we do not agree with its interpretation, we are probably bound thereby in this proceeding.

The provisions of Section 205(d) of the Act, [Title 50, U. S. C. A. Appx. 925(d)], the pleaded and proven defense of defendant is completely overlooked by the opinion. The effect of the opinion, though failing to mention Section 205(d), is to hold that said section does not constitute a defense insofar as single damages are concerned.

The Court of Appeals also overlooked the fact that on July 25, 1946, the Price Control Extension Act of 1946 was passed (Chapter 671, Public Laws 548, U. S. Code Congressional Service Advance Sheet 6—Laws of 79th Congress, Second Session, 1946, page 632 through 646). Section 205(e) of the Emergency Price Control Act of 1942 was amended so as to provide as follows:

> "The Administrator may not institute any action under this Subsection on behalf of the United States, or, if such action has been instituted, the Administrator shall withdraw same—
>
> "(1) If the violation arose because the person selling the commodity acted upon and in accordance with the written advice and instructions of the Administrator or any Regional Administrator or District Director of the Office of Price Administration;"

Petition for rehearing was filed with the United States Court of Appeals on November 8, 1946, and denied on the 21st day of November, 1946. The matters and questions here presented were thereby brought to the attention of the court. The duly certified record, including the proceedings in the United States District Court and the United States Court of Appeals (8th Cir.), is filed herewith under separate cover.

The opinion further held that the trial court's finding of diligence, positive efforts to comply and good faith on the part of the defendant were supported by substantial evidence. However, the opinion also held that the communications passing between the local price department and the defendant did not amount to "interpretation, advice or instruction justifying the packing company in making the charges complained of" (R. 155). The opinion fails to hold that the trial court's findings that the charges were made in good faith pursuant to and in reliance upon the communication was clearly erroneous or without evidential support. On the contrary, it holds that there was substantial evidence of good faith and positive effort to comply, but despite that fact it overruled the trial court's finding with respect to good faith as to single damages and affirmed the finding as to good faith, based on the same evidence, as to the treble damages. The effect of the opinion is to hold that the evidence was sufficient to justify the trial court's finding of good faith as far as treble damages were concerned, but insufficient insofar as single damages were concerned.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based on Section 240 of the Judicial Code, as amended (36 Statutes 1157—43 Stat. 938—Title 28, U. S. C. A., Sec. 347), which provides that in any case, civil or criminal, in a Circuit Court of Appeals, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, to require by certiorari that the lower court certify the cause to the Supreme Court for determination.

The judgment sought to be reviewed was rendered on the 24th day of October, 1946 (R. 156) by the United

States Court of Appeals for the Eighth Circuit and by the opinion that court, in effect, held that Section 205 (d) of the Emergency Price Control Act of 1942 [Title II, Sec. 205—56 Stat. 33—Title 50, U. S. C. A., Appx. Sec. 925 (d)] does not prohibit recovery of single damages in suits brought under the act by the Administrator even where the alleged overcharges resulted from action taken in good faith pursuant to the written instructions of the Administrator's duly qualified agent. Said section reads as follows:

> "No person shall be held liable for damages or penalties in any Federal, State or Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid. * * *"

The above statute has been construed by the Tenth Circuit Court of Appeals in **Schreffler v. Bowles**, 153 Fed. 2d 1, by the Seventh Circuit Court of Appeals in **Bowles v. Indianapolis Glove Co.**, 150 Fed. 2d 597, by the Fifth Circuit Court of Appeals in **Bowles v. Griffin**, 151 Fed. 2d 458, by the Emergency Court of Appeals in **Wells-Lamont Corp. v. Bowles**, 149 Fed. 2d 364, and by the Ninth Circuit Court of Appeals in **Bowles v. Franceschini**, 145 Fed. 2d 510, tc prevent recovery of damages for charges made in good faith pursuant to written instructions of the Administrator. The opinion in the present case is therefore in direct conflict with the opinions of all of the other courts that have considered this statute.

By the opinion in the present case the Court of Appeals reversed a fact finding of the trial court, based on oral testimony without holding that the finding was clearly erroneous or unsupported by evidence. In so doing the court failed to follow the provisions of the Rule 52A of the Federal Rules of Civil Procedure [36 Stat. 1167, Title 28, U. S. C. A., Rule 52, Fol. Sec. 723 (c)], which provides that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness."

The above jurisdictional grounds are substantial for the reason that defendant is wrongfully deprived of the benefit of a defense specifically provided by a Federal Statute; the judgment is in direct conflict with the rulings of other Circuit Courts of Appeal on an important federal question not heretofore passed on by this court and the court's action in reversing the fact finding of the trial court constitutes such a marked departure from the usual and proper procedure that it requires an exercise of this court's supervision.

The cases relied on to support the jurisdiction of this court are:

In re 620 Church Street Bldg. Corp. et al., 299 U. S. 24, 57 Sup. Ct. 88;

Muncie Gear Works v. Outboard Marine Mfg. Co., 315 U. S. 759, 62 Sup. Ct. 865.

QUESTIONS PRESENTED.

The questions presented by this petition for Writ of Certiorari are as follows:

1. Does Section 205 (d) of the Emergency Price Control Act of 1942 [56 Stat. 33, Title 50, U. S. C. A., Appx. Sec.

925 (d)] prohibit the recovery of damages for overcharges made in good faith pursuant to the written instructions of the Price Administrator's duly qualified State Price Attorney?

2. Whether an Appellate Court can properly reverse a trial court's findings of fact on good faith, based on the oral testimony of witnesses before him, without holding that such finding is clearly erroneous or unsupported by the evidence?

3. Whether an Appellate Court can accept the trial court's findings of fact on good faith insofar as that finding affects the recovery of treble damage penalties under Section 205 (e) of the Emergency Price Control Act of 1942 [56 Stat. 33, Title 50, U. S. C. A., Appx. Sec. 925 (e)] and reject the same findings, based on the same evidence, insofar as they affect the recovery of single damages under said section?

REASONS RELIED ON FOR ISSUANCE OF WRIT.

1. The opinion and judgment of the U. S. Court of Appeals (8th Cir.) is in direct conflict with the decisions of other United States Circuit Courts of Appeal in the following cases:

Schreffler v. Bowles (10th Cir.), 153 Fed. 2d 1;
Bowles v. Indianapolis Glove Co. (7th Cir.), 150 Fed. 2d 597;
Bowles v. Griffin (5th Cir.), 151 Fed. 2d 458;
Wells-Lamont Corp. v. Bowles (Emergency Court of Appeals), 149 Fed. 2d 364;
Bowles v. Franceschini (9th Cir.), 145 Fed. 2d 510.

2. The opinion and judgment hold that even though a citizen rely and act in good faith on a written instruction

from an authorized agent of the Price Administrator, he is still liable for damages in a suit by the Administrator. It therefore decides an important question of Federal Law concerning the relations of the Government to its citizens, which question has never been decided by this Court.

3. The opinion adopts the findings of the trial court on the good faith of the defendant for the purpose of sustaining the dismissal of the treble damage claim (R. 155) and reverses those findings in order to assess damages equal to the alleged overcharges, without finding them clearly erroneous or without evidential support. Obviously, the effect is to hold that the trial court was justified in finding from the evidence that defendant acted in good faith for one purpose, but was not justified in so finding on the same evidence, for another purpose. Either the finding was clearly erroneous or without evidential support, or it was proper and supported by substantial evidence. The inconsistent rulings of the Court of Appeals in its opinion constitutes such a great departure from established procedure that it calls for the exercise of this court's supervisory powers.

4. The action of the Court of Appeals in overruling the trial court's finding of fact on good faith, based on the testimony of witnesses is directly contrary to Rule 52 (a) of the Federal Rules of Civil Procedure and in conflict with the law as announced by this court and the other Circuit Courts of Appeal.

PRAYER.

Wherefore, petitioner respectfully prays this court that its Writ of Certiorari be issued and directed to the United States Court of Appeals for the Eighth Circuit, in the cause of Paul A. Porter, Administrator, Office of Price Ad-

ministrator (Appellant), v. Royal Packing Company, a Corporation (Appellee), Cause No. 13,354, Civil, to the end that said cause be reviewed by this court, as provided by law, and upon review thereof, said judgment be reversed and petitioner granted such relief as may appear to this Court to be just and proper.

DOUGLAS H. JONES,
LLOYD E. BOAS,
706 Chestnut Street,
St. Louis, Missouri,
Attorneys for Petitioner.

BRIEF

In Support of Petition for Writ of Certiorari.

OPINION OF THE COURT.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit, in the cause entitled Chester Bowles, Administrator, Office of Price Administration, Appellant, v. Royal Packing Company, a corporation, Appellee, which petitioner herein seeks to have reviewed, was handed down on the 24th day of October, 1946, and is officially reported in 157 Fed. 2d 524. It is included in the transcript of the record filed herewith at pages 150 through 156.

STATEMENT OF THE CASE.

The facts of the case are set out in the foregoing petition for a Writ of Certiorari, under the paragraph entitled "Summary of Statement of Matters Involved." To avoid unnecessarily burdening the Court with a repetition thereof, they will not be here repeated. Reference to the pertinent facts will be made in connection with our argument.

ASSIGNMENT OF ERRORS AND AUTHORITIES IN SUPPORT THEREOF.

POINT I.

The Court erred in reversing the Trial Court's conclusion that Section 205 (d) of the Emergency Price Control Act of 1942 [Title 50, U. S. C. A., Appx., Sec. 925 (d)] prohibited recovery of damages by the plaintiff.

Section 205 (d), Emergency Price Control Act [Title 50, U. S. C. A., Appx., Sec. 925 (d)] [56 Stat. 33].
Schreffler v. Bowles, 153 Fed. 2d 1;
Bowles v. Indianapolis Glove Co., 150 Fed. 2d 597 (7th Cir.);
Wells Lamont Corp. v. Bowles, 149 Fed. 2d 364;
Bowles v. Griffin, 151 Fed. 2d 458 (5th Cir.);
Bowles v. Franceschini, 145 Fed. 2d 510 (9th Cir.);
R. M. P. R. No. 169 [7 F. R. 1033, as amended 8 F. R. 9995].

POINT II.

The Court of Appeals erred in reversing the trial court's finding of good faith on the part of defendant, which finding was based upon the testimony of witnesses appearing before the trial judge.

Federal Rules of Civil Procedure, Rule 52, Title 28, U. S. C. A., Fol. Sec. 723, 48 Stat. 1064;
United States v. Aluminum Company of America, 148 Fed. 2d 416, 2nd C. C. A.;
Overfield et al. v. Pennsylvania R. R. Co. et al., 146 Fed. 2d 889;
Michigan Fire & Marine Insurance Co. et al. v. National Surety Corp., 156 Fed. 2d 329;
Urleng v. Fink, 141 Fed. 2d 58, 3rd C. C. A.;

Irick v. Irick et al., 150 Fed. 2d 514, 4th C. C. A.;
Amtorg Trading Corp. v. Higgins, 150 Fed. 2d 356, 2nd C. C. A.;
Adamson v. Gilliand, 242 U. S. 350, 61 L. Ed. 356;
Virginia Ry. Co. v. System Federation No. 40, 300 U. S. 551, Sup. Ct. 592;
Alabama Power Co. v. Ickes, 302 U. S. 464, 58 Sup. Ct. 300.

ARGUMENT.

POINT I.

There can be very little serious dispute about the meaning of the provisions of Section 205 (d) of the Emergency Price Control Act. It provides that:

> "No person shall be held liable for damages or penalties in any Federal, State or Territorial Court, on any ground for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule requirement or agreement thereunder, or any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded or determined to be invalid * * *" [Title 50, U. S. C. A., Appx., Sec. 925 (d)].

At the outset we desire to point out that the opinion of the Court of Appeals recited that the trial court made specific findings of fact that the defendant, at all times, made diligent and positive efforts to comply strictly with the regulations, and acted in good faith in making the charges in the sales complained of, that the Administrator (Appellant) had not directly assailed the trial court's finding of diligence, and positive efforts to comply in good faith on the part of the company and said:

> "And our study of the record has not persuaded that these parts of the findings were made without any substantial support in evidence or that there was abuse of the trial court's discretion in its conclusion that the Company was not liable for the multiple damages" (R. 155, 156).

To begin with, the conclusion of the trial court was not that appellee was not liable for multiple damages but, on the contrary, the conclusion of the trial court was to the effect that Section 205 (d) of the Act [Title 50, U. S. C. A., Appx., Sec. 925 (d)] prohibited the recovery of any damages or penalties because the charges were made in good faith pursuant to appellant's written interpretation and that plaintiff was not entitled to recover anything under the damage count of the petition except the admitted overcharges of $185.37 (R. 137).

Thus, it is apparent that both the Trial Court and the Court of Appeals held that the defendant had made diligent and positive efforts to comply strictly with the regulations and had acted in good faith in making the charges in the sales covered by the suit. The Trial Court's conclusion of law held that Section 205 (d) of the Act prohibited the recovery of damages and in substance the Court of Appeals held that despite the fact that the defendant had acted in good faith in making the sales, it was still liable for single damages, but not for treble damages. In so holding the opinion is in direct conflict with all of the reported decisions interpreting this section of the Emergency Price Control Act. This section has been before the courts on five different occasions. On each occasion the court has held that the section prohibited the recovery of damages where action was taken in good faith, pursuant to the written instructions of the Price Administrator's qualified agent. The most recent case is the case of **Schreffler v. Bowles**, 153 Fed. 2d 1, decided by the Tenth Circuit Court of Appeals in January of 1946. This was a case where the defendant contended that they were not liable for damages in any amount for the reason that they had acted in good faith. The evidence disclosed that the advice upon which they acted was oral advice, given by an employe of the Office of Price Administration. The

Court pointed out that the regulations required one desiring an interpretation to request it in writing and that since the defendant in that case had made no such request and had obtained no official writing signed by an authorized agent, the defense did not apply. However, the court did point out that if defendant had complied with the laws in obtaining the advice upon which he relied, the defense would have held. The court said, l. c. 4:

> "Appellants therefore **can urge good faith as a defense only if they follow the law in obtaining the advice upon which they rely.** This they failed to do. They did not obtain an official interpretation. At most, they obtained only an oral opinion. It follows as a matter of law that the defense of good faith was not available * * *"

It was considered by the Circuit Court of Appeals for the Seventh Circuit, in the case of **Bowles v. Indianapolis Glove Co.**, decided by that Court on the 3rd day of August, 1945 and reported in 150 Fed. 2d 597. There the defendant relied upon a letter from the Administrator's Office which advised them that they had not been able to clarify defendant's position from the Regional and National offices; that information was being assembled for use in preparation of a specific regulation for the glove industry, and that since the defendant's products were essential for the prosecution of the war, they saw no alternative other than to advise the defendant to continue shipments on the basis of his March, 1942, prices, and that it was understood that the letter did not legalize or validate the prices charged from May 11, 1942, up to the present time. The Court in denying the defendant's contention that a showing that the sales were made in good faith, pursuant to the letter, constituted a complete defense, and held that the letter was not obtained in the manner prescribed by the regulations for obtaining an interpretation and that

therefore, it did not constitute a defense despite the fact that it was in writing. In construing the Statute [Sec. 205 (d)] the Court said:

> **"That Congress could make use of 'good faith' as a defense when it wanted to appears in Section 205 (d) which provides for no liability 'in respect of anything done or omitted to be done in good faith pursuant to * * * any regulation, order, price schedule * * *.' The purpose of this section is to protect those who act 'pursuant to' the provisions of, or regulations under the Act as distinguished from those who 'violate' it."**

Further on in the opinion the Court quoted from the case of **Wells-Lamont Corp. v. Bowles**, 149 Fed. 2d 364, wherein the Emergency Court of Appeals said that one could not rely on oral interpretations since it must be presumed that they were advised of the procedure they were required to follow in obtaining an official interpretation upon which they could properly rely and stated:

> **"He (Administrator) has prescribed a reasonable procedure by which persons subject to the regulations may obtain official interpretations, by which all will be bound."** (Parenthetical matter ours.)

The Fifth Circuit Court of Appeals had this Statute under consideration in the case of **Bowles v. Griffin**, decided October 23, 1945, and reported in 151 Fed. 2d 458. There the Court, in holding that Section 205(d) constitutes a complete defense, had this to say, l. c. 460:

> "In this case, as to each transaction of rent collections, which is proven, **the District Court has the jurisdiction and the duty to decide whether or not it was done in violation of any order or regulation existing at the time, and if, at that time it was done in good faith pursuant to an order then in force, a defense is to be held established although the order has since been rescinded."**

It is also well to note that in the above case the Court held that the Administrator had authority to appoint agents who could bind him by their acts. In the present case, the letters upon which the defendant relied were admittedly written by the duly qualified State Price Attorney for the Administrator and no objection was made to their introduction in evidence.

The Ninth Circuit Court of Appeals had this Section under consideration in the case of **Bowles v. Franceschini,** which was decided November 10, 1944, and is reported at 145 Fed. 2d 510. There it was held that good faith was not a defense unless the action was in good faith pursuant to the act or regulations thereunder. The Court said, l. c. 512:

> **"That Congress could make use of 'good faith' as a defense when it wanted to, appears in Section 205 (d), which provides for no liability 'in respect of anything done or omitted to be done in good faith pursuant to * * * any regulation, order, price schedule * * *.'"**

The opinion further held that Section 205 (d), Title 50, U. S. C. A., Appx., Sec. 925 (d), absolves persons from liability for damages or penalties arising out of their compliance in good faith with the act and implementing regulations.

The above quoted cases are the only cases which we have been able to discover wherein the applicable section of the Act has been drawn in question and in each and every one of those cases, it was held that Section 205 (d) prevented recovery of damages or penalties for action taken in good faith, pursuant to an interpretation properly obtained from a qualified agent of the Administrator. In the present case there can be no question about the fact that the letters, which defendant relied upon, were

properly obtained. They were signed by a duly qualified officer of the Office of Price Administration, and are official binding interpretations, or orders of the Administrator. That fact is so obvious that no objection was made when they were introduced in evidence at the trial. There would be no basis for an objection because they were admittedly signed by the Administrator's State Price Attorney.

In the course of the opinion, the Court of Appeals stated that:

> "On this appeal, in addition to the questions we have discussed as to the meaning of the regulations, the question has also been argued on both sides and fully considered whether communications which passed between the local price department and the Packing Company amounted to interpretations, advice or instructions justifying the Packing Company in making the charges complained of. Though the Administrator has contended that they did not (and we so hold) he has not directly assailed the Trial Court's findings of diligent positive efforts to comply and good faith on the part of the company" (R. 155).

It is difficult to determine whether the Court intended to hold that the communications did not constitute an interpretation, or whether it intended to hold that the wording of the communications did not justify the defendant in making the charges. This, despite the fact that it found that defendant acted in good faith in making the charges. If the Court of Appeals intended to hold that the letters did not constitute an official interpretation, we are at a loss to understand the reason therefor, because no objection was ever made on the ground that they were not official interpretations and it was admitted that they were written and signed by the Administrator's duly qualified State Price Attorney, who was authorized to issue interpretations. In addition to this, the

Trial Court found that the communications did constitute an official interpretation and that they advised and instructed defendant that the 25¢ per c. w. t. transportation charge could be added to cover the cost of transporting the meat in defendant's own vehicle and that the defendant acted in good faith pursuant to and in reliance upon said written advice and instructions in making the charge (Findings of Fact 9 and 10, R. 136). There is nothing that can be found in the opinion of the Court of Appeals which can be held to constitute a finding that these findings by the Trial Court were erroneous or unsupported by evidence. In fact, the Court of Appeals held that the Trial Court was justified in finding that defendant acted in good faith in making the charges and that there was substantial evidence to justify that conclusion (R. 155).

Examination of the record in this case clearly discloses the reasons for the Court of Appeal's failure to attempt to demonstrate that the conclusion reached by the Trial Court was clearly erroneous or unsupported by evidence. The record shows that defendant's Secretary made a verbal inquiry of Mr. Fishgoll, plaintiff's Price Attorney on meats, for the purpose of determining how to determine his prices and transportation charges on the meat shipped for the first time to New York buyers (R. 109); that Mr. Fishgoll requested that he write a letter requesting a written interpretation (R. 109); that he did write such a letter and the same was introduced in evidence as Defendant's Exhibit "B". Reference to Exhibit "B" (R. 110) discloses that the last paragraph thereof inquired about "what maximum charges can be made for local and other deliveries of a greater distance from zone five. Also, should this charge be incorporated in ceiling price or enumerated separately on a bill of sale". The reply to that letter was dated March 8, 1943 and appears in the record as Defendant's Exhibit "C"

(R. 111, 114). It was signed by Roland J. Foulis, State Price Attorney. Paragraph 3 of the answers (R. 13) directed defendant to Sections 1364.407 (f) and 1364.454 (a) (6) of the Regulations which required that each invoice contain a separate statement of the transportation charge and local delivery charge. Defendant was further advised that delivery charges may be added to the applicable zone prices for beef wholesale or fabricated cuts, but that the regulation did not permit the addition of such charges on veal products. The paragraph concluded with a statement that when sales were made of beef wholesale or fabricated cuts, the transportation charges must be separately itemized and separately stated on the invoice. Mr. Sokolik testified that the letter did not give him a clear understanding of what pricing method to adopt, and that he telephoned Mr. Fishgoll and explained more in detail what occurred in the movement of the meat. It is important to note that the letter of March 8th directed defendant to call upon the writer, without hesitation, if there was any further information that he desired (R. 114).

On March 17th, another letter was received by defendant, over the signature of Ronald J. Foulis, State Price Attorney. This letter set out the questions asked and question three thereof (R. 116) clearly shows that the Administrator was fully advised concerning the questions defendant was presenting. It states:

> "The third question which you asked in your conversation with this office concerned delivery of beef carcasses and wholesale cuts to a purchaser in New York. You stated that you had never shipped such carcasses or cuts in car route or carload shipments, and you asked about the manner in which you are to determine your maximum price for such shipment."

The answer to the above quoted question referred defendant to Section 1364.451, Maximum Price Regulation

No. 169, subparagraphs (a) (3), and advised defendant that:

> "This language, when read in conjunction with other paragraphs in this Section, indicates that the maximum price at which you may sell beef carcasses or wholesale cuts to a purchaser in New York, in less than carload lots or carload lots, is the St. Louis Zone price, minus the required deductions, plus the permitted additions set forth in the regulation. The reason is that your distribution point is in this zone, and, as stated in the Section above, the applicable price is the price in the zone for which the seller's distribution point is located" (R. 117).

The above letter ended with a request that defendant should call upon the writer if there was any further information they could give.

On April 10, 1943, defendant received another letter from the plaintiff, unsolicited, which corrected the letter of March 17th (R. 119, 120), the second paragraph of the letter of April 10th (Defendant's Exhibit "E," R. 119, 120) advised defendant that in shipping beef in less than carload shipments it could not ship f. o. b. its plant and that in making shipments to New York, the defendant would pay the railroad charges and invoice the purchaser at the proper New York zone price, instead of the St. Louis zone price (R. 119, 120). The last paragraph of this letter covered carload rail shipments to buyers in New York and read as follows:

> "If, on the other hand, you ship by carload rail shipment or by truck, you may ship f. o. b. your plant, but the buyer must pay the shipping charges directly to the carrier. This is provided for in subparagraph (iii) of the Section referred to above [1364.451 (a) (3) (IV)]. Furthermore, if you use your own vehicle for transportation purpose, when

delivering from one zone to another, you would take the zone price in which is located your distribution point and add local delivery charges. 1364.451 (a) (e) (ii) is the section which covers such a transaction. If there is any further information you wish please do not hesitate to contact this office" (R. 120).

Mr. Sokolik's testimony was that subsequent to the receipt of the letter and on the strength of that letter and on the previous one, the defendant in making its charges, took the St. Louis zone price and deducted the carload discount of 25¢ per cwt. and added 25¢ per cwt. transportation or local delivery charge; that from that time until the suit was filed, defendant moved its meat from its plant to the railroad siding in its own vehicle and that it added the local delivery charges to cover that movement (R. 120).

Consideration of the above quoted portions of the communications clearly demonstrates the reason for the appellate court's failure to find that the trial court's finding that the charges were made in good faith, pursuant to the written instructions of plaintiff, was clearly erroneous or without evidential support. The quoted portion of Defendant's Exhibit "E", the letter of April 10, 1943, tells the defendant to do exactly what the evidence shows it did do, that is, that in shipping carload rail shipments they would take the St. Louis zone price and ship f. o. b. its plant with the buyer paying the shipping charges directly to the carrier, and in addition thereto ("further more" is defined in Webster's Dictionary as meaning "in addition thereto"), if defendant used its own vehicle for transportation purposes, when delivering from one zone to another, it could add local delivery charges. That is exactly what the defendant did. Defendant determined its prices and added local delivery charges for use of its own vehicle exactly as it was instructed to do.

A reference to the regulations [R. M. P. R. #169, Sec. 1364.455 (6)] defining local delivery, discloses that local delivery is defined as follows:

> "'Local delivery' means delivered by the seller otherwise than by rail, commencing at the seller's distribution point, or in the case of car routes, at the car unloading point and continuing to the buyer's place of business **or other point of delivery.**" (Emphasis ours.)

Delivery to a carrier of an f. o. b. shipment constitutes a delivery to the purchaser, title passes at that time, and certainly the point where it was delivered to the carrier would constitute the "other point of delivery" under the definition.

It is perfectly clear that the letter of April 10th specifically advised the defendant that it could add local delivery charges to cover the cost of transporting its meat in its own vehicle when using that vehicle for transportation purposes on zone to zone delivery. That is the only possible interpretation that can be placed upon the terms used when the circumstances are considered. The only other possible construction is that plaintiff advised defendant that if it used its own vehicle to deliver from its plant to its customers in New York City, it could charge a local delivery charge. A reference to the applicable sections of the regulation discloses that the maximum charge for local delivery, from a plant located in Zone 5, was 25¢ per cwt. [R. M. P. W. #169, Sec. 1364.454 (a) (3)] [Maximum Price Regulation revised No. 169, 7 F. R. 1033 as amended 8 F. R. 9995]. Obviously the plaintiff's state price attorney did not intend such a ridiculous meaning, and it is equally obvious that defendant could not be expected to interpret the communication to have such a meaning. Anyone of ordinary intelligence and business sense knows that meat could not be delivered from St. Louis to New York, by truck, for 25¢ per cwt.

We also desire to call this Court's attention to the fact that the interpretations introduced by the plaintiff at the trial of this case (Plaintiff's Exhibit "5," R. 127, 128, 129, 130, 131) clearly discloses that on July 18, 1944, one month before the institution of this suit, the San Francisco Office of the Price Administrator requested a **confirmation or correction** of an interpretation which held that where a packer, located any distance from the point of distribution, in the same zone where carload shipments were loaded on cars, **the loading point becomes the packing distribution point, thus enabling the packer to charge for hauling the meat from the slaughtering plant to the distribution point** (R. 130). It is interesting to note that about one month before this suit was instituted there was an interpretation from plaintiff's office, which held that the charges which defendant made to cover its transportation were proper charges. Is it unreasonable to assume that the State Price Attorney who advised defendant that the charges were proper was acting pursuant to that interpretation?

Exhibit 5 (R. 128) contains a teletype message to the various offices of the O. P. A., under date of January 8, 1945, which conclusively discloses that on the 13th day of December, 1944, three months after the institution of the present suit, **the Dallas office, Regional office for this Region and main office for this St. Louis local office, submitted to the Washington office, a question as to whether a slaughterer not located on a railroad siding could make a charge for transportation of meats from the slaughtering plant to a railroad siding** (R. 128). Thus it conclusively appears that three months after the present suit was instituted, the superiors of the employees of the local price department found it necessary to write the Washington office to find out whether or not these transportation charges were proper.

We respectfully submit that defendant was properly advised to make the charges complained of by an official interpretation from a qualified agent of the plaintiff. The Trial Court's findings that the charges were made in good faith, pursuant thereto, are clearly proper and supported by substantial evidence, and under the authorities herein cited, Section 205 (d) of the Emergency Price Control Act prohibits the recovery of damages and the Court of Appeals was in error in reversing the Trial Court and ordering the entry of a judgment for the alleged overcharges.

POINT II.

The Court of Appeals erred in reversing the Trial Court's finding of good faith, which was based upon the oral testimony of witnesses.

Considering substance, rather than form, it is apparent that the Court of Appeals reversed the Trial Court's findings that the defendant made the transportation charges in good faith, pursuant to the written instructions of the Administrator, or else it ruled that Section 205 (d) did not prohibit the recovery of single damages under such sections. The indications are that the Appellate Court did overrule the Trial Court's findings as to good faith, because the opinion held that the Court agreed with the Administrator's contention that the communications, passing between the local price department and the defendant, did not amount to interpretations, advice, or instructions justifying the Packing Company in making the charges complained of (R. 155).

On the other hand, the Court of Appeals also held that the Trial Court's finding that the defendant acted in good faith in making the charges in the sales complained of, was supported by substantial evidence and was not an abuse of discretion (R. 155). Harmonizing the two hold-

ings is impossible, so we are compelled to present an argument upon the theory that the Appellate Court did reverse a factual finding of the Trial Court which was based on oral testimony concerning good faith.

The Federal Rules of Civil Procedure provide that:

> **"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial judge to judge of the credibility of the witnesses."** (Rule 52, Rules of Civil Procedure, Tit. 28, U. S. C. A., Fol. Sec. 723, 48 Stat. 1064.)

This rule has consistently been held to require an Appellate Court to follow the fact findings of a trial judge which are based upon the oral testimony of witnesses appearing before him, unless they are found to be clearly erroneous, or unsupported by evidence. In the present case the Court of Appeals did not even attempt to demonstrate that the Trial Court's finding was clearly erroneous, or unsupported by evidence. In fact they affirmed the Trial Court's finding of good faith, with respect to the assessment of treble damages and held that the findings were supported by substantial evidence. Obviously, if the evidence was sufficiently substantial to support such a conclusion for one purpose, it was sufficiently substantial to support the same conclusion for another purpose. It could not support two diametrically opposed conclusions as held by the Court of Appeals.

The question of a party's good faith has consistently been held to be a question of fact. Furthermore, all of our appellate courts have gone so far as to say that the trial court's findings, on a question of good faith, if based upon the testimony of witnesses appearing before him, are absolutely conclusive. The rule was very clearly stated by Judge Learned Hand in the recent case of **United States**

v. Aluminum Company of America, 148 Fed. 2d 416, 2nd C. C. A., as follows, l. c. 433:

> "However, whatever may be said in favor of reversing a trial judge's findings when he has not seen the witness, **when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they 'must be treated as unassailable'** (citing cases). The reason for this is obvious and has been repeated over and over again. **In such cases the appeal must be decided by an incomplete record for the printed word is only a part, and often by no means the most important part, of the sense impressions which we use to make up our minds * * *.** Since an appellate court must have some affirmative reason to reverse anything done below, **to reverse a finding it must appear from what the record does preserve that the witnesses could not have been speaking the truth, no matter how transparently reliable and honest they could have appeared.** Even upon an issue on which there is conflicting direct testimony, appellate courts ought to be chary before going so far; **and upon an issue like the witness's own intent, as to which he alone can testify, the finding is indeed unassailable except in most exceptional cases."**

The Third Circuit Court of Appeals held in the case of **Overfield et al. v. Pennsylvania R. R. Co. et al.,** 146 Fed. 2d 889, that the personal culpability of a party was a question of fact to be determined by the trial court and that when it was so determined, it could not be disturbed by an appellate court on appeal.

In another recent case the Eighth Circuit Court of Appeals, the Court which decided the present case, held that questions involving intent are to be left to the trier of facts. In **Michigan Fire & Marine Insurance Co. et al. v. National Surety Corp.,** 156 Fed. 2d 329, that court held that the question, as to whether a surety company's attempt to enforce a claim, or its overvaluation of the claim,

constituted an attempt to defraud, was a question of fact to be determined by the trial court and that the appellate court was bound by the findings so made. There the court said:

> **"Such questions, involving as they do the element of intent, are ordinarily left to the trier of facts"** (citing cases). (Emphasis ours.)

It is important to note that the question there presented to that Court was whether or not the acts of surety company constituted an attempt to defraud within the meaning of the policies in suit. There they said it was a question of fact. Here, in the present case, we have a question as to whether or not the defendant exercised good faith in acting under and pursuant to the letters and communications written to it by the Administrator, and we submit that the same rule should apply. It is a question of fact to be determined by the trial court and the appellate court has no right to disturb the same.

In the case of **Urleng v. Fink**, 141 Fed. 2d 58, the Third Circuit Court of Appeals stated the rule concerning a finding on a party's good faith in the following manner, l. c. 61:

> **"Certainly the trial court's ultimate findings as to good faith of the transaction was a permissible deduction from other findings which cannot be said to be clearly erroneous, and especially not if we give due regard to the opportunity of the trial court to judge the credibility of the witnesses as Rule 52 of the Rules of Civil Procedure requires us to do."** (Emphasis ours.)

Other cases holding that the question of good faith is a question of fact for determination by the Trial Court and not by the Appellate Court are as follows:

Irick v. Irick et al., 150 Fed. 2d 514 (4th C. C. A.);

Amtorg Trading Corp. v. Higgins, 150 Fed. 2d 356 (2nd C. C. A.);
Overfield v. Pennsylvania R. R. Co., 146 Fed. 2d 889 (3rd C. C. A.).

This Court has consistently adhered to the rule that where a finding of fact is based upon the testimony of witnesses appearing before the trial judge, that finding is conclusive on appeal. In the recent case of **Adamson v. Gilliland,** 242 U. S. 350, 61 L. Ed. 356, this Court stated the rule as follows, l. c. 357, L. Ed. 61:

> "Considering that a patent has been granted to the plaintiff, **the case is pre-eminently one for the application of the practical rule that so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.'"** (Emphasis ours.)

It is interesting to note that the above case was a case where this court reversed a decree of the Eighth Circuit Court of Appeals and affirmed the Trial Court's findings of fact. There the findings were based upon the contents of a certain dray ticket relied on as fixing the date when certain castings were first made. This Court pointed out that even though the dray ticket was "open to grave suspicion," the case was one for the application of the rule that the finding of the trial court must be sustained on appeal, if supported by any evidence. The Eighth Circuit Court of Appeals had reversed the trial court on the finding of fact and on a hearing, after the issuance of a Writ of Certiorari, this Court affirmed the findings of the trial court.

Another rule consistently announced by this Court is that where the two courts below concur in a finding of fact, this Court must accept them as a conclusive basis for

a decision. The rule was stated in the case of **Virginia Ry. Co. v. System Federation No. 40**, 300 U. S. 551, S. Ct. Reporter 592, as follows, l. c. 596:

> "The concurrent findings of fact of the two courts below are not shown to be plainly erroneous or unsupported by evidence. **We accordingly accept them as the conclusive basis for decision.** (Citing cases.)" (Emphasis ours.)

Again in the case of **Alabama Power Co. v. Ickes**, 302 U. S. 464, 58 Sup. St. 300, the rule was stated as follows, l. c. 303:

> "**These findings were made, after hearing, by the district judge upon undisputed or conflicting evidence. The findings were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as unassailable.** Davis v. Schwartz, 155 U. S. 631, 636, 637, 15 S. Ct. 237, 39 L. Ed. 289; Adamson v. Gilliland, 242 U. S. 350, 353, 37 S. Ct. 169, 61 L. Ed. 356." (Emphasis ours.)

The last two cases are called to this court's attention for the reason that the appellate court's opinion in the present case holds that the trial court's finding that the defendant, at all times, made diligent and positive efforts to comply strictly with the regulations and acted in good faith in making the charges in the sales complained of was supported by substantial evidence (R. 155). The trial court's finding was that the defendant relied upon an official interpretation from plaintiff's duly qualified State Price Attorney advising defendant that the transportation charge could be added and that the transportation charge was so added by the defendant in good faith pursuant to and in reliance upon said written advice and instructions (R. 136). Therefore, both the trial court and the appellate court have concluded that there was substantial evidence

to support the finding that the defendant acted in good faith pursuant to the interpretation in making the charges complained of. It follows that, under the two cases cited above, this court must accept that finding as unassailable in the consideration of this case.

In conclusion, we respectfully submit that the opinion and judgment in the present case is in direct conflict with the decisions of other Circuit Courts of Appeal on the meaning and the effect of Section 205 (d) of the Emergency Price Control Act. It is contrary to and directly opposed to the clear wording of that section and has the effect of depriving the defendant of a defense specifically created by Federal statute. The findings of fact by both the trial court and the court of appeals clearly discloses that the defense of good faith was properly established and the court erred in ordering a judgment for the single amount of the alleged overcharges. The action of the Court of Appeals in overruling the trial court's findings of fact constitutes such a marked departure from the orderly judicial proceedings that this Court should exercise its supervisory powers to correct the same. In addition to the above, defendant is deprived of a right created by a Federal statute, which has never been construed by this Court, and should, in all fairness and justice, be entitled to have this Court settle the conflict between the various Courts of Appeal and determine defendant's rights. The effect of enforcement of the opinion and judgment of the Court of Appeals would be to subject defendant to a fine of some $14,000 for an act concededly done in good faith, after diligent and positive effort to comply. [The judgment is for $6928.18 (R. 156), and defendant would have to refund an equal amount to Defense Supplies Corporation (R. 124) and the cost of the transportation exceeded the amount charged (R. 123).] Such a result is shocking to even the dullest sense of justice.

Wherefore, defendant prays the Court to issue its Writ of Certiorari to the Eighth Circuit Court of Appeals to review the opinion and judgment rendered in this cause by said Court.

Respectfully submitted,

DOUGLAS H. JONES and
LLOYD E. BOAS,
706 Chestnut Street,
St. Louis, Missouri,
Attorneys for Petitioner.